

Reynolds, Inc. and Harold E. Gasaway. Case 25–CA–26869

February 14, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND WALSH

On December 6, 2000, Administrative Law Judge Karl H. Buschmann issued the attached decision. The General Counsel filed limited exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.¹

AMENDED REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, we shall require it to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Specifically, the Respondent shall be required to offer employee Harold E. Gasaway immediate and full reinstatement to his former position of employment or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed; and to make him whole for any loss of wages and other benefits he may have suffered by reason of the Respondent's discrimination against him, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, the Respondent will be required to expunge from its records all references to the unlawful discharge of Harold E. Gasaway and to notify him in writing that

¹ The General Counsel has excepted to the judge's failure to include a Conclusion of Law consistent with his finding that the Respondent told its employees that it had discharged others for asking individuals to show proof of their union membership. Inasmuch as the judge concluded that the Respondent threatened employees with discharge in violation of Sec. 8(a)(1) for "carding" other employees, we find that an additional Conclusion of Law would be cumulative and would not affect the remedy or the Order. We find merit, however, in the General Counsel's other exceptions requesting that the recommended remedy, Order, and notice conform to the factual findings and legal conclusions, and we shall modify the Decision and Order accordingly.

We shall also modify the judge's cease-and-desist remedial provisions to provide for a narrow order as the Respondent's unfair labor practices do not warrant imposition of a broad order. *Hickmott Foods*, 242 NLRB 1357 (1979).

Finally, we shall also modify the recommended Order to comport with the requirements of *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified by *Excel Container*, 325 NLRB 17 (1997).

this has been done and that the discharge will not be used against him in any way. In addition, the Respondent shall be required to post an appropriate notice, attached as an "Appendix."

ORDER

The National Labor Relations Board orders that the Respondent, Reynolds, Inc., Orleans, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge for asking individuals to show their union membership cards to assure adherence to the collective-bargaining agreement, or for engaging in union or other protected concerted activities.

(b) Discharging employees because they ask individuals to show their union membership cards to assure adherence to the collective-bargaining agreement, or for engaging in union or any other protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purpose of the Act.

(a) Within 14 days from the date of this Order, offer Harold E. Gasaway full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges he previously enjoyed.

(b) Make Harold E. Gasaway whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Harold Gasaway, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its place of business in Orleans, Indiana, and its office in Indianapolis, Indiana copies of the attached notice marked "Appendix."² Copies of the notice, on forms

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the Na-

provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. Further, in the event that, during the pendency of these proceedings, the Respondent has gone out of business or if, as the record indicates, the Indianapolis International Airport project has been completed, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all of its current and former employees who worked as operating engineers at the Indianapolis International Airport project since September 15, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with discharge for asking individuals to show their union membership cards to assure adherence to the collective-bargaining agreement or for engaging in union or other protected concerted activities.

WE WILL NOT discharge you for asking individuals to show their union membership cards to assure adher-

ence to the collective-bargaining agreement or for engaging in union or other protected concerted activities.

ence to the collective-bargaining agreement or for engaging in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL offer Harold E. Gasaway reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings or other benefits suffered as a result of our discrimination against him, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Harold E. Gasaway, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

REYNOLDS, INC.

Walter Steele, Esq., for the General Counsel.

S. Douglas Trolson, Esq., (*Hoffman, Drewry, Hancock, and Simmons*), of Indianapolis, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on June 8, 2000, upon a complaint, dated March 27, 2000, alleging that the Respondent, Reynolds, Inc. violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The underlying charge was filed by Harold E. Gasaway on December 20, 1999, alleging that the Respondent threatened employees for checking the union membership cards of other employees and that the Respondent discharged Gasaway because he had asked other employees to show proof of their union membership.

The Respondent's answer admits the jurisdictional aspects of the complaint and denies the commission of any unfair labor practices.

Based on my observation of the witnesses and my consideration of the entire record and the briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Reynolds, Inc., the Respondent is a corporation with its principal office and place of business in Orleans, Indiana, an office in Indianapolis, Indiana, and jobsites located throughout the State of Indiana, including a jobsite near the Indianapolis International Airport. As a contractor in the construction industry primarily in the construction of sewer projects, the Respondent, purchased and received at its Indiana offices and jobsites, goods valued in excess of \$50,000 directly from points outside the State of Indiana. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The International Union of Operating Engineers and the local union affiliates, including Local Union No. 103, (the Union) have been labor organizations within the meaning of Section 2(5) of the Act.

The Facts

The Respondent's work force consisted of the operating engineers, the carpenters, and the laborers. They were represented by three trade unions. The International Union of Operating Engineers Local Union 103, representing the operating engineers, had entered into a collective-bargaining agreement effective April 1, 1999 until March 31, 2004 with Indiana Constructors, Inc. as expressly agreed to and applicable to the Respondent (G.C. Exhs. 2, 3). Under the agreement, the Respondent is obligated to employ a certain percentage of its operating engineers from the Union's hiring hall when working in the Union's geographic area.

In 1999, the Company employed between 15 and 20 operating engineers, including Harold Gasaway and John Thompson, the job steward on the project, to construct a glycol containment facility used in the deicing of airplanes. The superintendent on the project was Frederick A. Landstrom and George Hall was the operators' supervisor. Harold Gasaway, a member of the Union Local 150, was employed by the Respondent off and on for 4 or 5 years as a heavy equipment operator. His latest period of employment with the Respondent began in June 1999, after Sean Hall, a foreman, had contacted Gasaway about working at the Indianapolis International Airport.

Landstrom testified that he was aware of a problem at the jobsite where some employees, notably laborers, would operate equipment normally assigned to operating engineers. He was also aware that Gasaway and Thompson engaged in the practice of checking the union membership cards of certain individuals to make sure that they were authorized to operate the equipment. This practice was commonly referred to as checking cards or "carding" an employee. Landstrom testified that this activity hindered work and that he instructed George Hall, one of the supervisors, to take care of a problem which he observed at least once a week for 6 weeks and which he described as follows (Tr. 34):

It was a big job and it was a long job and what I done was I would look over there and I would see the machines parked and guys talking. And I would say—I would ask George, "What's going on over there?" And he would say, "They are checking cards."

According to George Hall, Gasaway "stopped people and checked them . . . 4 or 5 times" (Tr. 122). He also observed Thompson checking the cards of fellow employees. Hall was concerned that this activity interfered with the progress of work on the project. On September 15, 1999, he informed Robert Bannister, an operator, that he wanted to see Gasaway. In his words, Hall said to Bannister (Tr. 125):

I said there was too much shit of people jumping on and off of equipment checking everybody and that I would take care of it. And I couldn't say anything about after hours, but during the hours they were working they was supposed to be on the machine working.

Bannister similarly testified that Hall wanted to speak to Gasaway and Thompson about the subject of carding of other employees. Bannister also testified that Hall threatened to fire anybody who engaged in that practice. Bannister testified as follows (Tr. 114):

He told me—He came over there and told me that—wanted to know where Harold and John was at. And I told him I wasn't sure. I thought they was over to the tool trailer. And he told me that the carding shit had to stop because the next person that carded somebody was going to be fired. . . .

And I told him that I hadn't been carding nobody and he told me that if I seen Harold or John, to tell them that he needed to see them.

After Bannister had informed Gasaway at the end of the day on September 15, 1999 that Hall was looking for him, Gasaway proceeded to the office trailer. He saw Hall and another Supervisor, Paul Burton. During the ensuing conversation, Hall made it clear that Gasaway would no longer be permitted to check the cards of individuals while they operated equipment.

According to Gasaway's testimony, Hall said that the next time he carded an individual, he would be fired. Gasaway further testified that Burton interrupted the conversation and warned Gasaway saying that if he continued to card people, he would be fired. Gasaway replied that the Union's business agent required him to card individuals and that he could be fined by the Union for refusing to do so. Burton suggested that Gasaway should report individuals to Hall whenever he did not recognize someone as an operator. At that point, Landstrom joined the conversation and asked if Gasaway doubted Hall's integrity. When Gasaway answered, yes, Hall told him that he was fired.

Hall's version of the conversation was different. According to his testimony, he told Gasaway that he would make sure that the individuals operating the equipment had cards, but that Gasaway became abusive and accused him of being a liar. Hall testified as follows (Tr. 128):

I think I told Harold that I would take care of it. That I wouldn't have people—I would make sure that they had cards. And he said I didn't do a good job of taking care of that. And Bud asked him if he was checking my integrity and he said, "Yeah, I'd lie like any other son-of-a-bitch. And Bud [Landstrom] said, "You're fired. You're fucking fired." And that was the end of the conversation.

Landstrom recalled the conversation as follows (Tr. 28):

George told Harold not to worry about it. Just don't worry about it. You know, "I'll take care of that. You stay on your equipment and keep working." And Harold said, "Yeah, right," you know, "Sure." And I said, "Are you questioning George's integrity?" And [he] that was when he said, "Yeah, he'll fucking lie to you like anybody else will." And it was kind of a heated discussion between him and George.

Landstrom testified that he immediately fired Gasaway for "cussing" a supervisor. The Company's personnel notice,

signed by Landstrom on September 15, 1999, states “bad attitude” as the reason for Gasaway’s discharge (G.C. Exh. 4).

ANALYSIS

1. The alleged threats

Out of concern that Gasaway and Thompson shut down their machines and huddle together talking for up to 5 or 10 minutes, instead of working, Landstrom instructed Hall to take care of the problem and have it stopped during working hours. Landstrom and Hall, who were aware that the two employees were checking other employees’ union cards, decided to put an end to that practice. Hall initially spoke to Robert Bannister and told him “that the carding shit had to stop because the next person that carded somebody was going to be fired.” Hall testified that he did not recall threatening anybody with discharge for carding people, but he admitted saying (Tr. 124):

I just told them that I didn’t want them doing it. I was catching heat from everybody up above and it was bullshit and it made be look bad and I wasn’t getting hard to be looking bad and to just quit it.

Gasaway similarly testified that both supervisors, Hall and Burton told him not to card anybody on the job or he would be fired. Thompson testified that Hall had told him that he was tired of all the union stuff and people carding and that he fired Gasaway for it.

Even though Hall did not recall uttering the threat, the consistent and credible testimony of the employees is clear, Hall threatened employees with discharge if they continued to card employees or ask employees whom they observed on heavy equipment to show proof of their union membership. It is well settled that employees’ efforts to implement a collective-bargaining agreement is protected under Section 7 of the Act. *Interboro Contractors, Inc.*, 157 NLRB 1295, enf. 388 F.2d 495 (2d Cir. 1967). Checking cards of employees is a customary practice in the construction industry of assuring adherence to the collective-bargaining agreement. *Denver Dry Wall Mountain Division*, 216 NLRB 51 (1975). Threatening employees with discharge for engaging in the practice, protected by Section 7 of the Act, violates Section 8(a)(1) of the Act.

The Respondent observed that the employees’ activities, consisting of shutting down their machines when they should be operating and huddling together while the equipment stood idle for an unreasonable period of time, went beyond the scope of protection under the Act. This may be true, but the Respondent issued a blanket prohibition against the carding of employees which is considered a protected activity, rather than issue orders prohibiting the undesired conduct of shutting down machines and stopping work for extended periods of time.

2. The discharge

According to the Respondent, Gasaway was not discharged for violating any rule against card checking, but for cursing (cussing) his supervisor and calling him a liar. The testimony of the final episode between Hall, Landstrom, and Gasaway is not entirely consistent, which prompted the General Counsel to observe that if the General Counsel’s witnesses are credited, a violation is established, if not, the case should be dismissed.

I find the version of the Respondent’s witnesses more plausible than Gasaway’s recollection of what he said in reply to Landstrom’s question, whether he [Gasaway] doubted Hall’s integrity. Gasaway’s testimony that he simply, recalled saying yes, does not remotely suggest the use of curse words. Hall and Landstrom testified that Gasaway used stronger language, such as, Hall would “lie like any other son-of-bitch” or Hall would “fucken lie like any body else.” It is clear by all accounts, however, that Gasaway did not curse his supervisor in spite of the use of obscenities. Indeed, Hall’s testimony reveals that he had no aversion to the use of four letter words. Not only did he recall saying to his employees that “there was too much shit of people—jumping on and off the equipment,” but he also used a similar term gratuitously, in one of his responses during his testimony (Tr. 126). Landstrom similarly revealed that he used vulgar language when he told Gasaway that he was fired (Tr. 28, 128). In short, Landstrom could hardly have taken any offense by Gasaway’s use of profanity during what he described as “a heated discussion between him and George” (Tr. 28).

In sum, the record reveals that strong words were used by both, management and employee, during a controversy or a labor dispute where management attempted to prohibit an employee’s protected activity and where the employee vigorously disagreed and expressed his doubts about management’s resolve to unilaterally enforce the terms of the collective-bargaining agreement. Under these circumstances, Gasaway did not lose the protection of the Act by the use of profanities or his expression of doubt about management’s promises. *Emarco, Inc.*, 284 NLRB 832 (1987). The record clearly shows that management was opposed to the practice of carding, that management threatened discharge for such conduct, and that Gasaway was discharged for his disagreement with management to discontinue that activity. The General Counsel has therefore demonstrated under the *Wright Line* test (251 NLRB 1083 (1980) that the Respondent discharged this employee because of his union or protected activity. The Respondent has clearly failed to show that Gasaway would have been discharged even in the absence of any union considerations.

CONCLUSIONS OF LAW

1. Respondent, Reynolds, Inc, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent threatened employees with discharge for asking employees whom they observed operating heavy equipment to show proof of their union membership or, for engaging in protected concerted activities, in violation of Section 8(a)(1) of the Act.

4. Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Harold E. Gasaway for engaging in union or protected activities.

5. This unfair labor practice has an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and from any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Further, the Respondent shall be required to offer employees Harold E. Gasaway immediate and full reinstatement to his former position of em-

ployment and make him whole for any loss of wages and other benefits he may have suffered by reason of Respondent's discrimination against him in the manner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, the Respondent shall be required to post an appropriate notice, attached as an "Appendix."

[Recommended Order omitted from publication.]